CLERK'S OFFICE 2482

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1900.

No. 242.

ANDREW H. RUSSELL AND WILLIAM R. LIVERMORE, APPELLANTS,

vs.

THE UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

FILED APRIL 5, 1900.

(17,704.)

24821

(17,704.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1900.

No 242.

ANDREW H. RUSSELL AND WILLIAM R. LIVERMORE, APPELLANTS,

vs.

THE UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

INDEX.

	Original.	Print.
Petition filed	1	1
Amended petition	1	1
Exhibit A—Letter of Captain Russell to Chief of Ordnance, November 16, 1892	11	6
B—Letter of Captain Whipple to Captain Russell, November 18, 1892	11	7
C—Letter of Captain Russell to Chief of Ordnance, December 9, 1892	12	7
D—Letter of Captain Shaler to Captain Russell, December 19, 1892	13	8
E—Letter of Captain Russell to Commissioner of Patents, February 6, 1893	14	8
F—Letter of Commissioner of Patents to Captain Russell, February 14, 1893	15	9
G—Letter of Captain Russell to Chief of Ordnance, June 30, 1893	15	9
H—Endorsement of Captain Shaler, July 7, 1893	16	10

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., FEBRUARY 1, 1901.

	Original.	Print
Exhibit I—Letter of Captain Russell to Chief of Ordnance, November 22, 1893	16	10
K—Letter of Captain Shaler to Captain Russell, December 1, 1893	22	13
L—Agreement between Krag-Jorgensen Gevarkompagni and Chief of Ordnance, June 7, 1893	23	14
Demurrer to amended petition	26	16
Opinion on demurrer	27	16
Judgment	30	19
Application for and allowance of appeal	31	19
Clerk's certificate	32	20

1 Court of Claims.

ANDREW H. RUSSELL and WILLIAM R. LIVERMORE
vs.
THE UNITED STATES. } No. 20883.

I.—*Petition.*

The claimants filed their original petition on the 18th day of September, 1897, and on February 7, 1899, by leave of court, they filed the following amended petition, to wit:

Amended Petition. Filed February 7, 1899.

To the honorable the Chief Justice and judges of the Court of Claims:

Andrew H. Russell and William R. Livermore respectfully show unto your honorable court, that whereas:

1. The claimants are citizens of the United States and officers of the United States Army.

2. On or about January 9, 1880, the claimant Russell made application, in due form, for letters patent of the United States for his invention of certain new and useful improvements in breech-loading guns, and thereafter, on or about August 3, 1880, letters patent of the United States, numbered 230,823, were granted to the
2 said Russell for and upon the same. A copy of the said letters patent duly certified is here in court, ready to be produced.

3. By an assignment, bearing date February 4, 1891, the claimant Russell transferred and conveyed to the claimant Livermore an undivided one-half interest in the said invention and letters patent. Thereafter, the claimant Livermore, by an assignment bearing date February 21, 1893, transferred and conveyed to the claimant Russell one-third of an undivided one-half interest in the said letters patent and invention. Thereafter, by an assignment bearing date October 7, 1898, the claimant Livermore transferred and conveyed all of his right, title, and interest in and to the said invention and letters patent, to the claimant Russell.

4. Pursuant to an advertisement of a board of officers of the United States Army, convened, pursuant to an act of Congress approved February 4, 1881, for the purpose of selecting a magazine rifle for the military service of the United States, the claimant Russell submitted to the said board an operative magazine rifle, made in accordance with the device described in the said letters patent, number 230,823; and on or about December 16, 1890, the claimant Russell again submitted the said rifle to a board of officers of the United States Army, which was convened for the like purpose. The said boards made reports, which are to be found in the following publications of the Government: Board of 1881, see report of the

chief of ordnance for 1882 (Ho. Ex. Doc. No. 1, 47th Cong., 2d sess., pt. 2, vol. 3, pp. 329 *et seq.*); board of 1892, see report of the chief of ordnance for 1893 (Ho. Ex. Doc. No. 1, 53d Cong., 2d sess., pt. 2. vol. 3, pp. 132 *et seq.*) It is prayed that the relevant portions of these two reports be treated as a part of this petition.

5. On or about September 15, 1892, the second board recommended the adoption of the magazine rifle presented to it by
3 the Krag-Jorgensen Gevaerkompagni, of Christiania, Norway, which will hereinafter be termed the "Army rifle," and the said rifle was then provisionally adopted by the War Department for the use of the United States Army.

6. On November 16, 1892, the claimant Russell, acting for the claimant Livermore and himself, directed a letter to the chief of ordnance, U. S. Army, and stated therein that the inventions described in and protected by the said letters patent number 230,823 were embraced, embodied, and included in the said "Army rifle," and requested the chief of ordnance to make provision for the payment of compensation to these claimants by the United States for and on account of the use of the said patent, in the proposed manufacture of the said "Army rifles." (A copy of said letter is hereunto annexed, marked "Exhibit A," and made part hereof.)

7. On November 18, 1892, the Ordnance Department replied to the said letter of the claimant Russell, stating that its business arrangements with the Krag-Jorgensen Gevaerkompagni for the manufacture of the said "Army rifle" had not been completed; that the said company might agree to indemnify the United States for any damages it might sustain on account of the use of any patent rights which might be used by the United States in the manufacture of the said "Army rifles," and thereby the claimants would be provided with a remedy to be obtained from the said company; or the Government might proceed to manufacture the said "Army rifles" without such an arrangement, in which case the claimants could obtain their remedy by suit against the United States in the Court of Claims, after the manufacture had progressed. (A copy of the said letter is hereunto annexed, marked "Exhibit B," and made part hereof.)

4 8. On December 9, 1892, the claimant Russell, acting for the claimant Livermore and himself, directed a letter to the chief of ordnance of the U. S. Army, in which he stated that the claimants could obtain no adequate remedy against the Krag-Jorgensen Gevaerkompagni for an infringement of their patent, because the said company was a foreign corporation, and had no property in the United States upon which the claimants could levy to satisfy a judgment, and the claimant Russell therein repeated his request made in his said letter of November 16, 1892, that the chief of ordnance provide for the payment of compensation to the claimants. (A copy of the said letter is hereunto annexed, marked "Exhibit C," and made part hereof.)

9. Thereafter, the Ordnance Department directed a letter to the claimant Russell, informing him that certain investigations were being made in the Patent Office with regard to the said "Army

rifle," and advising that the claimants present their claim to the Commissioner of Patents. Pursuant thereto the claimant Russell, acting in behalf of the claimant Livermore and himself, directed a letter to the Commissioner of Patents, wherein he claimed that the said "Army rifle" embraced, embodied, and included the inventions described in and protected by the claimants' said patent. In reply thereto the Commissioner of Patents directed a letter to the claimant Russell, wherein he declined to exercise any jurisdiction over the said claim. (Copies of the said letters are hereunto annexed, marked "Exhibits D, E, and F," respectively, and are made part hereof.)

10. On June 30, 1893, the claimant Russell, acting in behalf of the claimant Livermore and himself, directed a letter to the chief of ordnance of the United States Army, saying that he had presented his claim to the Commissioner of Patents, as advised by the Ordnance Department, and that the Commissioner of Patents had
5 declined to take jurisdiction over the case. The claimant Russell therefore renewed the request contained in his letter of November 16, 1892, and asked that the Ordnance Department allow him a hearing before any business arrangements with the Krag-Jorgensen Gevaerkompagni were closed. (A copy of said letter is hereunto annexed, marked "Exhibit G," and made part hereof.)

11. On July 7, 1893, the letter last above mentioned was returned to the claimants with an endorsement by the Ordnance Department wherein the claimants were advised to present a statement of the case in writing, to be filed in the Ordnance Department for future reference. It was stated further that an agreement had been made between the War Department and the Krag-Jorgensen Gevaerkompagni, whereby the latter was required to indemnify the United States against all damages for infringement of patent rights which might arise in the manufacture of the said "Army rifle." (A copy of the said endorsement is hereunto annexed, marked "Exhibit H," and made part hereof.)

12. In compliance with the request contained in the said endorsement, the claimant Russell, acting for the claimant Livermore and himself, on November 22, 1893, directed a letter to the chief of ordnance wherein he made a full statement of the claimants' case and stated the particulars wherein the said "Army rifle" embodied and contained inventions described in and protected by the claimants' said letters patent 230,823. (A copy of this letter is hereunto annexed, marked "Exhibit I," and made part hereof.)

13. On December 1, 1893, the Ordnance Department directed a letter to the claimant Russell, in which it cited a provision contained in an agreement between the United States and the Krag-Jorgensen Gavaerkompagni, and stated that the claim of the said Russell and
6 Livermore could not be determined by the Ordnance Department. (A copy of the said letter is hereunto annexed, marked "Exhibit K," and made part hereof.)

14. On June 7, 1893, the said Krag-Jorgensen Gevaerkompagni and the United States, represented by Brigadier General D. W. Flagler, U. S. Army, chief of ordnance, acting in its behalf, under the direction and by authority of the Secretary of War, entered into

a contract whereby it was, *inter alia*, provided that the said company granted to the United States the right to manufacture an unlimited number of the said "Army rifle" for the military service of the United States, under letters patent of the United States numbered 429,811, issued on June 10, 1890, and 491,212, issued on February 21, 1893, both of which letters patent were granted to O. W. G. Krag and E. Jorgensen, for the sum of one dollar ($1.00) per arm for all firearms manufactured by the United States during the lifetime of said patents; that the said company claimed that all the mechanism of the said "Army rifle" not open to public use was duly covered and protected by its said patents; and it was further agreed that, before any royalties were paid by the United States, the said company should furnish a good and sufficient bond in the penal sum of twenty-five thousand dollars ($25,000) to protect and defend the United States against all suits and claims by any and all persons for the infringement of their inventions in the manufacture of the said "Army rifles," and to pay all judgments that might be obtained against the United States for the same, and it was further provided that the said company should indemnify the United States, and all persons acting under them, for all liability on account of any patent rights granted by the United States which might affect the right to manufacture in the said contract provided for; and it was further agreed that
7 the United States should pay to the said company the royalty above mentioned upon the number of the said "Army rifles" duly certified as manufactured by the proper officers of the Ordnance Department. (A copy of the said contract is hereto annexed, marked "Exhibit L," and made part hereof.)

15. Thereafter the United States proceeded to manufacture the said "Army rifles," and on or about January 1, 1894, did manufacture and introduce for service in the United States Army, and use, and has since then continued to so manufacture and use the said "Army rifles," and the United States did then and has since continued to account to the Krag-Jorgensen Gevaerkompagni for royalties at the rate named in the said contract, and did pay over to the said company certain sums on account thereof, but the said company failed to furnish a bond to indemnify the United States as in the said contract provided, and the United States for its indemnity and in lieu of such bond did, from time to time, prior to June 16, 1896, with the consent of the said company, withhold payment to it of sums payable on account of the said royalties, which sums so retained did, on or about June 16, 1896, amount, to wit, to upwards of twenty-five thousand dollars ($25,000), and, on or about June 16, 1896, the Krag-Jorgensen Gevaerkompagni did furnish to the United States a bond, with sureties, in the penal sum of twenty-five thousand dollars ($25,000), conditioned as follows:

"That whereas the Krag-Jorgensen Gevaerkompagni of Christiania, Norway, has, on the seventh day of June, 1893, entered into a contract with the United States, represented by Brigadier General D. W. Flagler, chief of ordnance, for granting unto the United States full rights to manufacture an unlimited number of the Krag-Jorgensen magazine firearms, for the military service of the United States,

under the American patents, Nos. 429,811, of June 10, 1890,
8 and 492,212, of February 21, 1893, granted to O. W. J. Krag and E. Jorgensen, during the lifetime of the said patents, and by the said contract covenanted to indemnify the United States, and all persons acting under them, for all liability on account of any patent rights granted by the United States which may affect the right to manufacture therein contracted for, and further covenanted and agreed to furnish, before the payment of any royalties by the United States, a good and sufficient bond in the penal sum of twenty-five thousand dollars, to protect and defend the United States against all suits and claims by any and all persons for infringement of their inventions in the manufacture of said arms, and to pay all judgments that may be obtained against the United States for the same:

"Now, therefore, if the said Krag-Jorgensen Gevaerkompagni shall and will in all respects indemnify the United States, and all persons acting under them, for all liability on account of any patent rights granted by the United States which may affect the right to manufacture granted by said contract, and shall and will fully protect and defend the United States against all suits and claims by any and all persons for infringement of their inventions in the manufacture of said arms, and pay all judgments that may be obtained against the United States, or any officer or agent thereof for the same, then the above obligation shall be void and of no effect; otherwise to remain in full force and virtue."

And the United States did thereupon accept the said bond, and paid over to the Krag-Jorgensen Gevaerkompagni the sum theretofore withheld by the United States to indemnify it, as aforesaid.

16. From time to time, between January 1, 1894, and the date of the filing of this amended petition, the United States did manufacture and introduce for service in the United States Army, and use, large numbers of the said "Army rifles," to wit, upwards of seventy-five thousand thereof.

9 17. All of the said "Army rifles," manufactured and used by the United States, as aforesaid, embraced, embodied, and included the inventions belonging to the claimants and described in and protected by the claimants' said letters patent No. 230,823, and not protected by the said letters patent of the Krag-Jorgensen Gevaerkompagni, and by reason thereof the United States derived great benefit and profit, to wit, a benefit and profit of upwards of one ($1.00) dollar on each one of the said "Army rifles."

By reason of the foregoing facts, the claimants say:

(1.) That neither the said contract, entered into by the United States and the Krag-Jorgensen Gevaerkompagni (Exhibit L) nor the said bond of indemnity delivered by the said Krag-Jorgensen Gevaerkompagni to the United States, did provide the claimants with a remedy against the said Krag-Jorgensen Gevaerkompagni, for the use made by the United States of the claimants' said patented invention in accordance with the first alternative proposed by the Ordnance Department in its said letter to the claimant Russell, bearing date November 18, 1892 (Exhibit B).

(2.) That there is to be implied from the use by the United States of the claimants' said patented invention, as hereinbefore related, a contract, whereby the United States agreed to pay to the claimants reasonable compensation for the same, and whereby the amount of such compensation was to be ascertained by means of a suit to be brought by the claimants in this court, in accordance with the second alternative proposed in the said letter (Exhibit B), and that the sum of $100,000 would be reasonable compensation for the said use, and that the United States has failed to pay the claimants the said sum of $100,000 or any sum, or sums, whatsoever for or on account of the said use, although duly requested thereunto.

10 The claimants are the only persons owning or interested in the claim above set forth, and no assignment or transfer of the said claim or of any part thereof or interest therein, has been made. The claimants are justly entitled to receive and recover from the United States the sum of one hundred thousand dollars ($100,000), after allowing all just credits and offsets. The claimants have always borne true allegiance to the Government of the United States, and have not in any way aided, abetted, or given encouragement to rebellion against the said Government, and they believe the facts hereinabove stated to be true.

Wherefore the claimants pray for judgment against the United States in the sum of one hundred thousand dollars ($100,000) and for such further relief as this honorable court may be entitled to grant, both at law and in equity, in the premises.

ANDREW H. RUSSELL.
WILLIAM R. LIVERMORE.

McCAMMON & HAYDEN,
Attorneys for Claimants.

STATE OF ILLINOIS, }
County of Cook, } ss:

Andrew H. Russell, being duly sworn, deposes and says that he is one of the claimants named in and who subscribed the foregoing amended petition; that he has read the same and knows the contents thereof, and that the facts herein stated are true to the best of his knowledge and belief.

ANDREW H. RUSSELL.

Sworn to and subscribed before me this fourth (4) day of February, A. D. 1899.

[SEAL.] WALTER L. FISHER,
Notary Public.

11 EXHIBIT A.

(Copy.)

WASHINGTON, D. C., *November* 16, 1892.

To the chief of ordnance, U. S. Army.

SIR: In the interest of Major Wm. R. Livermore, U. S. Army, and myself, I have the honor to invite attention to claims 22, 28, and 29

in U. S. patent No. 230,823, owned by us, as we believe their provisions to be infringed in the construction of the Krag-Jorgensen magazine gun lately adopted by the War Department, the points of resemblance being in the connection between the magazine and the receiver.

In considering the allowance to inventors, we would request that our claims for these vital points of construction be regarded.

Very respectfully, your obedient servant,

(Signed) A. H. RUSSELL,
Capt. of Ordnance, U. S. Army.

EXHIBIT B.

5839.

ORDNANCE OFFICE, WAR DEPARTMENT,
WASHINGTON, *November* 18, 1892.

Capt. A. H. Russell, Ordnance Department, U. S. A., cor. 15th St. & N. Y. Ave., Washington, D. C.

SIR: In reference to your letter of the 16th instant claiming the use of your patent right in the Krag-Jorgensen gun, lately
12 adopted by this department for trial, which has been received and placed on file, I am instructed by the chief of ordnance to inform you that the business arrangements with the Krag-Jorgensen Company for the manufacture of this arm have not yet been completed.

On the one hand, that company may agree to indemnify the United States on account of any patent rights granted by the United States which may affect the manufacture of the guns, in which case your recourse would be to communicate directly with the company.

On the other hand, should the Government proceed to manufacture the arms without such arrangement, your course will be to bring a suit against the Government in the Court of Claims after manufacture has progressed.

Respectfully,

(Signed) C. W. WHIPPLE,
Capt. Ord. Dept., U. S. A.

EXHIBIT C.

WASHINGTON, D. C., *December* 9, 1892.

To the chief of ordnance, U. S. Army.

SIR: In reference to my letter to the chief of ordnance of November 16, 1892, and to the answer of November 18th from the Ordnance Office in reply thereto, concerning the claims 22, 28, and 29 in the U. S. patent to me, No. 230,823 (a copy of the specifications on which was enclosed in my letter), I desire to say that I could practically have no remedy for infringement of my patent against the Krag-Jorgensen Company, as they have not, that I am

aware of, any property in this country; and also that I presume it would be more satisfactory to the United States, as it certainly would be to me, to have whatever may be justly due to me on my patents allowed without litigation.

13 I therefore hope that the Ordnance Office will bear my letter of November 16th, and this letter, in mind, and allow me a hearing before any business arrangement with the Krag-Jorgensen Company is closed.

Very respectfully, your obedient servant,

(Signed) A. H. RUSSELL,
Capt. of Ordnance, U. S. Army.

EXHIBIT D.

ORDNANCE OFFICE, WAR DEPARTMENT,
WASHINGTON, *December* 19, 1892.

Capt. A. H. Russell, World's Columbian Exposition, Chicago, Ill.

SIR: Referring to your letters of the 16th ult. and the 9th inst., on the subject of infringement of your patent in the manufacture of the Krag-Jorgensen magazine firearm, I am instructed by the chief of ordnance to inform you that in a letter received from the Commissioner of Patents dated 15th inst. he states that the invention of H. I. Krag and Erik Jorgensen for improvement in machine firearms has been examined and the invention has been found patentable in view of the state of the art, but that other applications are pending which appear to conflict in subject-matter; therefore the application of Krag and Jorgensen will be withheld from issue until that question is settled definitely.

I am also instructed to inform you that in a letter to the Commissioner of Patents, dated 16th inst., the chief of ordnance transmitted to him copies of your above-mentioned letters of 16th ult. and 9th inst.

14 Should you desire further presentation of your patent, it is suggested that you communicate direct with the Commissioner of Patents.

Respectfully,

(Signed) CHARLES SHALER,
Capt. Ord. Dept., U. S. A.

EXHIBIT E.

1429 NEW YORK AVE.,
WASHINGTON, D. C., *February* 6, 1893.

To the Commissioner of Patents.

SIR: In an official communication from the chief of ordnance U. S. A., dated December 19, 1892, it is suggested that I "communicate direct with the Commissioner of Patents" in regard to the following matter.

I presented to the Ordnance Office the claim that the gun recommended for adoption by the U. S. Army, known as the Krag-

Jorgensen gun, infringed claims 22, 28, and 29 of my patent No. 230,823, dated August 3, 1880, and I asked that the Government do justice by me in case of using such device.

The chief of ordnance states that there were claims now pending in the Patent Office, and referred me to you, with the information that copies of my letters had been sent you December 16, 1892.

Copies of these letters are enclosed, with copies of replies from the Ordnance Office.

I have the honor to inquire what further action should be taken by me.

Very respectfully,

(Signed) A. H. RUSSELL.

15 EXHIBIT F.

DEPARTMENT OF THE INTERIOR,
UNITED STATES PATENT OFFICE,
WASHINGTON, D. C., *February* 14, 1893.

Capt. A. H. Russell, U. S. A., 1429 New York avenue, Washington, D. C.

SIR: I have your letter of the 6th instant, and in reply you are advised that it is not seen how the Patent Office has any jurisdiction in the matter concerning which you write. Questions of infringement can be determined only by the courts.

Very respectfully,

(Signed) W. E. SIMONDS,
Commissioner.

12,509 Div. A–1893.

EXHIBIT G.

CHICAGO, ILL., *June* 30, 1893.

To the chief of ordnance, U. S. Army, Washington, D. C.

SIR: In reference to correspondence regarding infringement of my patent No. 230,823 by the manufacture of the Krag-Jorgensen magazine rifle recommended by the magazine gun board, I have the honor to state that I communicated direct with the Commissioner of Patents, as suggested in the letter of December 19, 1892, from the Ordnance Office, and was told that the Patent Office had no jurisdiction. The patent infringed is one of long standing, and no
16 claim is made that the Krag-Jorgensen patents infringe, but it is claimed that the construction of the gun embodying those patents does infringe my patent of 1880.

I therefore respectfully renew the request contained in my letter of December 9, 1892, that the Ordnance Office will "allow me a hearing before any business arrangement with the Krag-Jorgensen Company is closed."

Very respectfully, your obedient servant,

(Signed) A. H. RUSSELL,
Capt. of Ord., U. S. Army.

EXHIBIT H.

(1st endorsement.)

ORDNANCE OFFICE, WASHINGTON, *July* 7, 1893.

Respectfully returned to Capt. A. H. Russell, Government building, Jackson park, Chicago, Ill., with information that a statement of this case should be made in writing for file at this office, and for future reference, as the case stated cannot be determined by the Ordnance Office.

The agreement with the Krag-Jorgensen people is such that they are required to guarantee the U. S. against all damages for infringement.

(Signed) CHARLES SHALER,
Acting Chief of Ordnance.

EXHIBIT I.

CHICAGO, ILL., *November* 22, 1893.

To the chief of ordnance, U. S. Army, Washington, D. C.

SIR: In response to your communication of July 7, 1893, in the 1st endorsement on my letter of June 30, 1893, Ordnance
17 Office files 3515 of 1893, I hereby respectfully state my position with regard to the Krag-Jorgensen rifle construction recently adopted for the U. S. Army, and now in process of manufacture at the Springfield armory.

I do not claim to be the inventor of all the mechanism of said gun. There are probably several important and meritorious inventions involved. The grant of a patent by the Patent Office on some features, however, does not authorize the making or using of other features covered by other patentees, as I am informed, and as seems a reasonable construction of law.

The specific features used in said gun and claimed by me, and believed to be covered by my U. S. patent No. 230,823 of August 3, 1880, are embraced in the 22d, 28th, and possibly in the 29th claims of said patent. A free description of the general features of my invention as used in the Krag-Jorgensen gun would be "a magazine feeding into the side of the receiver under a bridge, with the entrance way under the bridge narrowed at the rear of the receiver, so as to permit but a slight projection of the side of the cartridge into the receiver when the bolt is drawn back, but with a wider opening further forward, so that as the cartridge moves forward impelled by the bolt, it will find a full-width passage under the bridge, through which it passes into the receiver."

This bridge and magazine opening is described in my patent, referred to, page 6, lines 100 *et seq.*, as follows:

"In filling the chamber of the magazine the gate is forced downward as the cartridges are filled in, leaving ample space to insert cartridges between the top edge of the magazine wall and a bridge or top part, M, and thus supply the magazine. When relieved of

the downward pressure the gate ascends far enough to prevent egress of cartridges in any other way than sidewise from the magazine mouth into the receiver B′ beneath the bridge.

18 "The bridge M is of peculiar formation on its under and inner surface, and is at one side of the longitudinal centre of the barrel and breech-bolt housing. (See particularly Figs. 9, 10, 11, 12, 13, and 14, where is represented the manner of curving or recessing the bridge so as to admit cartridges to the receiver and guide and control their movements as supplied to the receiver from the magazine mouth, and thence conducted to the firing chamber by the thrust of the breech bolt A^2.)

"Supposing the breech bolt to be retracted and about to be advanced, the operation of supplying and seating a cartridge from the magazine is as follows, reference being had to the last referred to figures and to Figs. 3, 4, and 6, ignoring for the present the hinged gate N: The topmost cartridge is elevated by the pusher against the bridge, so that its flange projects partially, but very slightly, into the path of travel of the breech-bolt head (see dotted lines, Fig. 11), and in which position it is prevented from accidental inward movement by a slight ridge or swell, *n*, (see Figs. 4 and 11) at the rear portion of the edge or wall of the opening in the receiver bottom, with which the magazine communicates, and by a similar ridge or downward swell, *n′*, on the bridge.

"The point or nose of the cartridge is guided past the spring *l* and into the firing chamber *b*, by the flaring way or incline *m* as the bolt advances.

"Before the cartridge has been moved forward far enough by the advance of the bolt to jam or bind crosswise, the flange will have been moved to a point where the two ridges *n n′* begin to slope respectively downward and inward gradually to the plane of the bottom or lowest part of the receiver, and upward and inward, thus allowing the flange to pass toward its place in the receiver. The bridge is also cut away on a curve or incline m^2, forward and inward from its lower edge to *m′*, so that as the front of the cartridge is entering the chamber the rear is being gradually brought into line therewith.

"About the time the flange has been advanced to the point indicated by *m′*, Fig. 9, the curved recess or incline m^2 of the inner and under side of the bridge, which had previously served

19 to gradually admit the inward passage of the flange, and which at this point terminates in a swell or ridge similar to *n′*, now serves to prevent its escape or outward movement and to direct it into the proper position to be pushed home and firmly seated by the bolt, as already described * * * The bridge M is shown as formed with or attached to the magazine. It may, however, obviously be formed with the shoe or breech of the gun partly over and at one side of the receiver chamber."

In the main, this description applies to the Krag-Jorgensen gun quite as well as to my own gun, and my opinion is confirmed by that of experts that this part of my construction has been adopted in that arm.

I am informed that my rights under my patent depend on the claims therein, and my belief is sustained by expert opinion that the Krag-Jorgensen gun under construction at Springfield infringes the 22d claim of my patent, which reads as follows:

"22. The combination of the shoe chamber or receiver, the bridge at the side and top of the receiver, and the magazine chamber having an inlet to receive the cartridges inserted downward outside and beneath the bridge, and a mouth by which to conduct them beneath the bridge into and at the side of the receiver, substantially as hereinbefore set forth."

Taking the elements of this claim separately, it will be seen that the Krag-Jorgensen gun has "the shoe or receiver." All bolt guns and many others have it. The Krag gun is, however, one of a few to have "the bridge at the side and top of the receiver." It also has "the magazine chamber having an inlet to receive the cartridges inserted downward outside and beneath the bridge." It is true the Krag-Jorgensen gun shows the loading opening in a different place from that illustrated in my patent, but my claim is not limited as to the exact location of the loading opening, and the whole tenor of my patent is against the theory that I am limited in this claim to the precise construction shown in my drawing. Further, I am informed that the rule of law is that a patent claim, if valid, covers its mechanical equivalents—that is, other devices operating in a similar way to a like result, which is certainly the case in this instance. My claim further specifies "a mouth by which to conduct them" (the cartridges) "beneath the bridge into and at the side of the receiver, substantially as hereinbefore set forth." This language, like the rest of the claim, applies quite as well to the Krag-Jorgensen gun as to the one invented and constructed by me.

It thus seems demonstrable that the Krag-Jorgensen gun, having adopted part of my invention, has also adopted that part covered by claim 22.

Claim 28 in my specified patent is as follows:

"28. The combination, substantially as hereinbefore set forth, of the reciprocating breech bolt, the shoe chamber or receiver, the magazine chamber having a mouth, as described, the cartridge-supplying mechanism, and the bridge M, having the ridge or swell n', and otherwise curved or recessed, substantially in the manner and for the purpose set forth."

The Krag-Jorgensen gun has "the reciprocating breech bolt, the shoe chamber or receiver, the magazine chamber having a mouth;" it has "cartridge-supplying mechanism;" and "the bridge having the ridge or swell" below the main part of the bridge and extending forward precisely in the same manner and for the same purpose as the swell n' of my patent, and is otherwise curved or recessed substantially in the manner set forth in my patent. I therefore feel warranted in the belief that my claim 28 covers the Krag-Jorgensen construction, and is infringed thereby.

Claim 29 of my patent is as follows:

21 "29. The bridge M, located relatively to the receiver and mouth of the magazine essentially as shown and described, and having the rear ridge n', and the curved or inclined surfaces m' and m^2, substantially as and for the purpose hereinbefore set forth."

The construction of the Krag-Jorgensen gun substantially conforms to the terms of this claim also, yet I am not quite certain that the bridge in that gun has a projection the equivalent of that described as m^2 in my patent. I presume this question can only be determined by careful expert examination.

I, therefore, base my claim for compensation on the infringement of my claims 22 and 28, and the probable infringement of claim 29, in my said patent No. 230,823, of August 3, 1880, by the Krag-Jorgensen construction.

I am not fully informed as to the terms of the contract between the United States and the owners of the Krag-Jorgensen patent. Assuming that the owners of said patent are in ignorance of my rights in the premises, I respectfully request that a copy of this communication may be sent to said parties, and a duplicate of this paper is forwarded for that purpose, with an extra copy of my patent to go with the duplicate. I further request that I may be furnished with the name and address of the responsible parties representing the Krag-Jorgensen interest.

I am aware that in the event of a suit in equity, the alleged infringing parties have a statutory right to challenge the validity of my patent, and, to avoid litigation, I am willing to go further than to make a mere statement of the *prima facie* case as above, and show to infringing parties or their experts that my claims are well within my rights, provided I am met by these parties in a fair spirit, and with a desire to make just compensation when my title to the property is shown.

22 My first official notice to the Ordnance Department of this infringement is dated November 16, 1892 (Ordnance Office file 5839 of 1892), but a gun presenting the special features here mentioned was submitted by me to the board on magazine guns, convened by general orders 31, H. Q. A., March 21, 1881, and it is described in the report of that board. It is now in my possession subject to examination.

Very respectfully, your obedient servant,

(Signed) A. H. RUSSELL.

EXHIBIT K.

3515. (Copy.)

ORDNANCE OFFICE, WAR DEPARTMENT,
WASHINGTON, *December* 1, 1893.

Capt. A. H. Russell, Ordnance Department, U. S. A., Government building, Jackson park, Chicago, Ill.

SIR: I am instructed by the chief of ordnance to acknowledge the receipt of your letter of the 22d inst., and to inform you that the

terms of the contract between the United States and the Krag-Jorgensen Co. contain a clause to the following effect:

"The said party of the first part shall indemnify the United States and all persons acting under them for all liability on account of any patent rights granted by the United States which may affect the right to manufacture herein contracted for."

You have requested that a copy of your communication
23 and a copy of your patent should be forwarded by this office to the company, and for that purpose you have forwarded duplicates of your letter and of the patent specifications. It is considered best that you should forward these communications direct; they are, therefore, returned to you for the purpose. The address of the contracting company is "The Krag-Jorgensen Gewehr Kompagnie, Christiania, Norway." The other papers, enclosures to Ordnance Office file 3515, containing letter and copies of patent specifications, are filed in this office for future reference.

Your attention is again invited to the statement of the first endorsement on that file, which states that the case "cannot be determined by the Ordnance Department."

Respectfully,

(Signed) CHARLES SHALER,
Capt., Ord. Dept., U. S. A.

Exhibit L.

Articles of agreement entered into this seventh day of June, eighteen hundred and ninety-three, between the Krag-Jorgensen Gevarkompagni of Christiania, in the county of ——, State of Norway, of the first part, and the United States, by Brigadier General D. W. Flagler, chief of ordnance, acting under the direction and by authority of the Secretary of War, for and in their behalf, of the second part.

1st. This agreement witnesseth, that the said party of the first part, for themselves and their successors, etc., and the said party of the second part, for and in behalf of the United States of America, have mutually agreed, and by these presents do mutually covenant and agree, to and with each other, as follows, viz:

24 The said party of the first part does hereby contract and engage with the United States to grant unto the said United States full rights to manufacture an unlimited number of the Krag-Jorgensen magazine firearms for the military service of the United States, under the American patents, Nos. 429,811 of June 10, 1890, and 492,212 of February 21, 1893, granted to O. W. J. Krag and E. Jorgensen—and which said party of the first part claims fully cover all the mechanism of said magazine firearms not open to public use—for the sum of one dollar ($1.00) per arm for all firearms manufactured by the party of the second part during the lifetime of said patents.

It is further stipulated and agreed that the right to manufacture

magazine firearms herein granted shall also embrace and apply to all improvements which may hereafter be made or owned by the Krag-Jorgensen Gevarkompagni in these arms during the lifetime of the above-mentioned existing patents.

It is further stipuated and agreed that before any royalties are paid by the United States, the Krag-Jorgensen Gevarkompagni shall furnish a good and sufficient bond in the penal sum of twenty-five thousand dollars ($25,000.00), to protect and defend the United States against all suits and claims by any and all persons for infringement of their inventions in the manufacture of these arms, and to pay all judgments that may be obtained against the United States for the same.

2d. All the — herein contracted for shall be delivered by the said party of the first part.

3d. The said party of the first part shall indemnify the United States and all persons acting under them for all liability on account of any patent rights granted by the United States which may affect the right to manufacture herein contracted for.

4th. For the right to manufacture herein contracted for, which shall be delivered, inspected, and accepted as aforesaid, there shall be paid by the United States to the said party of the first part, on bills in duplicate, made in approved form, and duly authenticated by the proper officers of the Ordnance Department, the price aforementioned in the funds furnished for the purpose by the United States.

5th. If any default shall be made by the party of the first part in delivering all or any of the — mentioned in this contract, of the quality and at the times and places herein specified, then, in that case, the said party of the second part may supply the deficiency by purchase in open market or otherwise (the articles so procured to be of the kind herein specified as near as practicable), and the said party of the first part shall be charged with the expense resulting from such failure. Nothing contained in this stipulation shall be construed to prevent the chief of ordnance, at his option, upon the happening of any such default, from declaring this contract to be thereafter null and void, without affecting the right of the United States to recover for defaults which may have occurred; but in case of overwhelming and unfor-seen accident, by fire or otherwise, the circumstances shall be taken into equitable consideration by the United States before claiming forfeiture for nondelivery at the time specified.

6th. Neither this contract nor any interest therein shall be transferred by the said party of the first part to any other party; and any such transfer shall cause the annulment of the contract so far as the United States are concerned. All rights of action, however, to recover for any breech of this contract by the said party of the first part are reserved to the United States.

7th. No member or delegate to Congress, nor any person belonging to, or employed in, the military service of the United States, is

or shall be admitted to any share or part of this contract, or to any benefit which may arise herefrom.

KRAG-JÖRGENSENS GEVAERKOMPAGNI, [SEAL.]
By F. PETERSON, *Attorney*, [SEAL.]
D. W. FLAGLER, [SEAL.]
Brig. General, Chief of Ordnance.

Witnesses:
E. A. SKILLMAN.
WINFIELD S. CLARKE.

26 II.—*Demurrer. Filed March* 17, 1899.

ANDREW H. RUSSELL and WILLIAM R. LIVERMORE
vs.
THE UNITED STATES. } No. 20833.

And now come the said defendants, by their Attorney General, and demurring to the amended petition in this cause, state as the ground thereof that the petition does not allege facts sufficient to constitute a cause of action.

L. A. PRADT,
Assistant Attorney General.

27 III.—*Opinion of the Court.*

RUSSELL AND LIVERMORE
v.
THE UNITED STATES.

On demurrer.

DAVIS, J., delivered the opinion of the court:

The question presented by the demurrer is whether the facts pleaded show an implied contract between these parties for the use by the defendants of plaintiffs' alleged patented invention for a military rifle.

After allegations as to the issue of patent, not at this moment important, plaintiffs state, in substance, that to an army board organized to select a magazine rifle they submitted one invented by them; this also to another army board and to other army officers. The second board named in the petition recommended the adoption by defendants of the Krag-Jörgensen device, herein termed the "Army rifle;" this about September 15, 1892. Some two months later one of the plaintiffs wrote the chief of ordnance of the army stating (we quote from the petition), "that the inventions described in and protected by the said letters patent No. 230,823 were embraced, embodied, and included in the said Army rifle," and requested the "chief of ordnance to make provision for the payment of compensation to these claimants by the United States for the use of said patent in the proposed manufacture of the said 'Army rifles.'"

To this was replied by defendants that their business with the Krag-Jörgensen Company had not been completed; that this com-

pany might agree to indemnify defendants herein for loss incurred by the use of the Army rifles, "and thereby the claimants would be provided with a remedy to be obtained from the said Krag-Jörgensen Geværkompagni, or the Government might proceed to manufacture the said 'Army rifles' without such an arrangement, in which case the claimants could obtain their remedy by suit against the United States in the Court of Claims after the manufacture had progressed."

December 9, 1892, plaintiffs wrote the chief of ordnance that they could recover nothing from the Krag-Jörgensens, a foreign corporation, and again asked compensation. To this the chief of ordnance answered, suggesting an application to the Patent Office. This application was made with a claim that the Army rifle contained plaintiffs' devices. The Commissioner of Patents "declined to exercise any jurisdiction over the said claim." Later (July 7, 1893), the Ordnance Department informed plaintiffs (after advising a statement of their case in writing) that an agreement had been made with the Krag-Jörgensen Company "whereby (we still quote the petition) the latter was required to indemnify the United States against all damages for infringements of patent rights which might arise in the manufacture of the said Army rifle."

28 An answer (November 22, 1893) was sent to this communication, stating plaintiffs' position, following which (December 1, 1893) the Ordnance Department cited to plaintiffs this said clause in the Krag-Jörgensen agreement (Exhibit E to petition):

"The said party of the first part (the Krag-Jörgensen Company) shall indemnify the United States and all persons acting under them for all liability on account of any patent rights granted by the United States which may affect the right to manufacture herein contracted for." The Ordnance Bureau added that these plaintiffs' claims could not be determined by that bureau.

The petition further states that General Flagler (chief of ordnance) contracted with the Krag-Jörgensens for "an unlimited number of the said Army rifle," they (Krag-Jörgensen) claiming their invention to be sufficiently protected by patent.

The penalty of the Krag-Jörgensen's bond to defendants was to be "to protect and defend the United States against all suits and claims by any and all persons for its infringement of their inventions in the manufacture of the said Army rifle, and to pay all judgments that might be obtained against the United States for the same"

The petition further alleges defendants' use of Krag-Jörgensen rifles, the payment to that company of royalties, and then comes therein this statement: "But the Krag-Jörgensen Company then failed to furnish a bond to indemnify the United States as in the said contract provided, and the United States, for its indemnity and in lieu of such bond, did from time to time, prior to June 16, 1896, with the consent of the Krag-Jörgensen Company, withhold sums payable on account of the said royalties," which amounted to a certain sum.

Finally plaintiffs, in substance, allege that certain Army rifles

manufactured and used by defendants included their inventions (patent 230,823)—inventions not protected by the Krag-Jörgensen patent.

Such is the abstract of the petition through which plaintiffs seek to recover from defendants a royalty for use of a patented device. This recovery they cannot have unless they show a contract, express or implied, between the parties to this action. Therefore, without inquiring as to the validity of the plaintiffs' patent, we look to the petition alone (the hearing is on demurrer) to see what allegations therein appear showing such "a meeting of the minds" upon this matter as may make a contract. We find therein pleaded a submission of plaintiffs' device to defendants' army board, and the adoption by defendants of another device; then a demand made by plaintiffs upon defendants for compensation, urging that their "inventions" (theretofore patented) were in the new Army rifle. Defendants, however, declined all responsibility in the matter, and referred plaintiffs to the Krag-Jörgensens for remedy or to this court, saying that their (defendants') "business with the Krag-Jörgensen Company had not been completed."

Later, in response to plaintiffs' statement that they could recover nothing from the Krag-Jörgensens, the chief of ordnance advised an application to the Patent Office, and again later they were informed of the Krag-Jörgensen bond "to indemnify the United States against all damages for infringement of patent rights which might arise in the manufacture of the said Army rifle."

29 There is nothing in these facts to show that the defendants through their officers entered into or intended to enter into any contract with plaintiffs. The first answer plaintiffs received from the Department of War (Exhibit B) stated that "business arrangements with the Krag-Jörgensen Company for the manufacture of this arm have not yet been completed. * * * That company may agree to indemnify the United States on account of any patent rights granted by the United States which may affect the manufacture of the guns, in which case your recourse would be to communicate directly with the company.

"On the other hand, should the Government proceed to manufacture the arms without such arrangement, your course will be to bring a suit against the Government in the Court of Claims after manufacture has progressed."

The Patent Office denied jurisdiction; the Ordnance Office said they could not determine the case.

In Schillinger's case (24 C. Cls. R., 278) this court held, after a review of the authorities: "A careful examination of these cases shows that a contract to pay is implied whenever the Government, acting through a competent agent, takes or uses individual property, acknowledging explicitly or tacitly that the property is individual property." (Affirmed by the Supreme Court, 155 U. S. R., 163. See also Berdan's case, 25 C. Cls. R., 355; 26 *ib.*, 48; 30 *ib.*, 491, and cases cited. Affirmed by the Supreme Court, 156 U. S. R., 552.)

In brief, it appears from the petition that the chief of ordnance informed plaintiffs that the Krag-Jörgensen Company, with whom

he had not finished his negotiation, might agree to indemnify them "for losses incurred in the use of the Army rifle, whereby plaintiffs would have a remedy against that company, or the Government might proceed to manufacture 'the said Army rifle,' without an agreement of indemnity for infringement from the Krag-Jörgensens, when plaintiffs would find a remedy in this court." Later another letter to plaintiffs threw all responsibility on the Krag-Jörgensen Company.

Some effort is made to establish a right in plaintiffs through the Krag-Jörgensen bond to the Government. This bond was given to defendants to indemnify them in case of successful action for infringement arising from use of the Krag-Jörgensen device. There are no rights whatever secured to plaintiffs by this bond. They are not privy to it.

Upon the whole case it appears that the Government at no moment recognized any rights in plaintiffs against it or any responsibility upon its part to them. Quite the contrary. Defendants took an indemnity bond from the Krag-Jörgensens and threw all responsibility for conflicting claims upon them. The case falls within the principle of that of Schillinger. No contract is developed by the allegations of the petition. It is therefore ordered dismissed.

30 IV.—*Judgment of the Court.*

ANDREW H. RUSSELL and WILLIAM R. LIVERMORE
vs.
THE UNITED STATES. } No. 20883.

At a Court of Claims held in the city of Washington on the 26th day of February, 1900, judgment was ordered to be entered as follows:

It is ordered that the demurrer of the defendants be sustained, and it is further ordered, adjudged, and decreed that the petition of the claimants be dismissed.

BY THE COURT.

31 V.—*Application for and Allowance of Appeal.*

ANDREW H. RUSSELL and WILLIAM R. LIVERMORE
vs.
UNITED STATES. } No. 20883.

Now come the claimants, Andrew H. Russell and William R. Livermore, by McCammon and Hayden, their attorneys, and pray the court to allow them an appeal to the Supreme Court of the United States from the judgment of this court, entered in the above-entitled cause on the 26th day of February, 1900.

McCAMMON & HAYDEN,
Att'ys for Claimants.

Filed February 28, 1900.

MARCH 20, 1900.

Ordered that the foregoing application for appeal be allowed as prayed for.

BY THE COURT.

32 Court of Claims.

ANDREW H. RUSSELL and WILLIAM R. LIVERMORE
vs.
THE UNITED STATES. } No. 20883.

I, John Randolph, assistant clerk Court of Claims, hereby certify that the foregoing are true transcripts of pleadings, opinion of the court, judgment of the court, application for and allowance of appeal to the Supreme Court of the United States.

Seal Court of Claims.

In testimony whereof I have hereunto set my hand and affixed the seal of said Court of Claims this 2d day of April, A. D. 1900.

JOHN RANDOLPH,
Ass't Clerk Ct. of Claims.

Endorsed on cover: File No., 17,704. Court of Claims. Term No., 242. Andrew H. Russell and William R. Livermore, appellants, *vs.* The United States. Filed April 5th, 1900.